



Coast Guard Proposed Rule

Assessment Framework and Organizational Restatement
regarding Preemption for Certain Regulations Issued by the
Coast Guard

CPRA Board Meeting
October 15, 2014
Chris Barnes



committed to **our coast**

USCG Proposed Rule on Preemption

- Coast Guard Proposed Rule was published December 27, 2013 and may be located at:
 - <https://federalregister.gov/a/2013-29714>; or
 - <http://www.regulations.gov> , search for Docket No. USCG-2008-1259
- Original closing date for the comment period was March 27, 2014, then extended to May 26, 2014.

USCG Proposed Rule on Preemption

- The proposed rule operates in two ways:
 - First, it describes the Coast Guard's interpretation of the preemptive effect of certain current Coast Guard regulations.
 - Second, the rule sets forth criteria and a process that the Coast Guard will undertake in future regulatory projects for evaluating the preemptive impact of those regulations.

Presidential Memo on Preemption

- The Presidential Memo on preemption (5/20/09)
 - Precludes federal agencies from asserting preemption in new regulations unless sufficient legal basis; and
 - Requires agencies to review regulations asserting preemption issued within the preceding 10 years (after 5/20/99) to determine if there is sufficient legal basis for preemption.
- The proposed rule is USCG's implementation of the Presidential Memo.

USCG Proposed Rule

- Proposed rule is intended to “restate” and “clarify existing law on preemption” and “identify those statutes and rules the Coast Guard considers to be preemptive.”
- Rule directly affects various shipping regulations:
 - Maritime vessels, interstate navigation, maritime regulations including international shipping treaties and vessel regulations.
- USCG: Rule will not “alter in any way the rights of states.”
- However, the proposed rule is vague, specifically covers over 100 sections of regulations and potentially covers numerous regulations that are not specifically listed.

Appendix to the Proposed Rule

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[EFFECTIVE DATE OF FINAL RULE]. For regulations not listed in this appendix, refer to the preemption assessment framework in 33 CFR 1.06-1.

2. Regulations with Preemptive Impact Pursuant to the Ports and Waterways Safety Act.

2.1 Regulations in effect on [EFFECTIVE DATE OF FINAL RULE] and having the preemptive effect described in 33 CFR 1.06-10(b) pursuant to Title I of the Ports and Waterways Safety Act. 33 CFR parts 64, 101, 103, 104, 105 (for State maritime facility security laws that are either less stringent or that actually conflict with or frustrate an overriding need for national uniformity), 120, 128, 161, 166, 167, 169 and 401.

2.2 Regulations in effect on [EFFECTIVE DATE OF FINAL RULE] covering fields foreclosed from State regulation as described in 33 CFR 1.06-10(c) pursuant to Title II of the Ports and Waterways Safety Act. With respect to tank vessels only: 33 CFR parts 157, 163, and 168; 46 CFR parts 2, 8, 13, 15, 30, 31, 32, 34, 35, 36, 38, 39, 50, 52, 53, 54, 56, 57, 58, 59, 61, 62, 63, 64, 98, 105, 110, 111, 112, 113, 150, 151, 153, 154, 159, 160, 161, 162, 163, 164, 170, 172, 174, 175, 178, 179, and 199.

2.3 Regulations in effect on [EFFECTIVE DATE OF FINAL RULE] and appropriate for analysis under the “overlap analysis” described in 33 CFR 1.06-10(d).

Using the overlap analysis described in 33 CFR 1.06-10(d), the Coast Guard has made the following determinations:

(a) In 33 CFR part 155, the following sections are grounded in Title II authority, and therefore cover fields foreclosed from State regulation: 155.100 through 155.1030, 155.1055 through 155.1060, 155.1110 through 155.1120, and 155.1135 through 155.1150.

(b) In 33 CFR part 156, the following sections are grounded in Title I authority, and therefore preempt any similar, identical or contrary State regulation: 156.118, 156.215, 156.220, 156.230, 156.300 and 156.310.

(c) In 33 CFR part 156, the following sections are grounded in Title II authority, and therefore cover fields foreclosed from State regulation: 156.100 through 156.115, 156.120 through 156.210, 156.225, and 156.320 through 156.330.

(d) In 33 CFR part 160, the following sections are grounded in Title I authority, and therefore preempt any similar, identical or contrary State regulation: 160.1 through 160.7, 160.105 through 160.107, and 160.115 through 160.215.

(e) In 33 CFR part 160, the following regulations as applied to tank vessel operations are grounded in Title II, and therefore cover fields foreclosed from State

regulation: 160.101, 160.103, 160.109, 160.111 and 160.113.

(f) In 33 CFR part 162, the following sections are grounded in Title I authority, and therefore preempt any similar, identical or contrary State regulation: 33 CFR 162.1 through 162.40, 162.65 through 162.65(b)(3), 162.65(b)(4)(ii) through 162.65(b)(6), 162.75 through 162.75(b)(5)(iv), 162.75(b)(6) through 162.80(a)(1), 162.80(a)(3) through 162.90(b)(2)(iii), 162.90(b)(2)(vi) through 162.90(b)(3)(iv), 162.90(b)(4)(ii) through 162.117(h)(2), 162.120 through 162.125(a), 162.125(b)(3) through (5).

(g) In 33 CFR part 162, the following regulations are promulgated pursuant to Title II, and therefore cover fields foreclosed from State regulation: 162.65(b)(4)(i) operation and equipping, 162.75(b)(5)(v) operation and equipping, 162.75(b)(5)(vi) operation, 162.80(a)(2) operation and equipping, 162.90(b)(2)(iv) manning, 162.90(b)(2)(v) operation, 162.90(b)(4)(i) operation and equipping, 162.117(h)(3) and (4) operation, 162.255(e)(1) and (2) operation and equipping, and 162.255(e)(3) operation.

(h) In 33 CFR part 164, the following regulations are promulgated under Title I and therefore preempt any similar, identical or contrary State regulation: 33 CFR 164.01, 164.02, 164.03, 164.11(c), 164.11(e), 164.11(f)-(i), 164.11(k)-(n), 164.11(p), 164.11(q), 164.19(b), 164.19(c), 164.51, 164.53, 164.55, 164.61, 164.70, 164.78(a)(3)-(8) and 164.82(c).

(i) In 33 CFR part 164, the following sections are grounded in Title II authority, and therefore cover fields foreclosed from State regulation: 33 CFR 164.11(b), 164.11(d), 164.11(j), 164.11(o), 164.11(r) through 164.19(a), 164.25 through 164.46, 164.72 through 164.78(a)(2), and 164.78(b) through 164.82(b).

(j) In 33 CFR 165, the following sections are grounded in Title I authority, and therefore preempt any similar, identical or contrary State regulation: 33 CFR 165.1 through 165.150(b)(4), 165.150(b)(6) through 165.501(d)(2), 165.501(d)(4) through 165.501(d)(5), 165.501(d)(7) through 165.510(d), 165.510(f)(1) through 165.510(f)(3), 165.510(f)(9) through 165.540(f)(6), 165.540(f)(9) through 165.803(e)(2), 165.803(g) through 165.810(e), 165.810(f)(2), 165.811(a) through 165.811(c), 165.811(e) through 165.923(b)(2)(ii)(D), 165.923(b)(2)(ii)(F) through 165.1152(d)(1), 165.1152(d)(3) through 165.1181(d)(1), 165.1181(d)(3) through 165.1704(c)(1), 165.1704(c)(3) through 165.1704(c)(5), and 165.1706 through 165.2030.

(k) In 33 CFR part 165, the following sections are grounded in Title II, and therefore cover fields foreclosed from State regulation: 165.150(b)(5) manning, 165.501(d)(3)(i)-(ii) and (6) equipping,

165.510(e) operation, 165.510(f)(4) operation, 165.510(f)(5) manning, 165.510(f)(6) operation, 165.510(f)(7) and (8) equipping, 165.540(f)(7) and (8) equipping, 165.803(e)(3) and (4) equipping, 165.803(f)(1)-(3) equipping, 165.810(f)(1) manning, 165.810(f)(3) equipping, 165.811(d) equipping, 165.923(b)(2)(iii)(E) equipping, 165.1152(d)(2) operation, 165.1181(d)(2) operation, and 165.1704(c)(2) and (6) equipping.

3. Regulations in effect on [EFFECTIVE DATE OF FINAL RULE] and covering fields foreclosed from State regulation as described in 33 CFR 1.06-20.

All of the regulations in 33 CFR part 96 have been prescribed under the authority of 46 U.S.C. Chapter 32, and therefore cover fields foreclosed from State regulation.

4. Regulations in effect on [EFFECTIVE DATE OF FINAL RULE] and covering fields foreclosed from State regulation as described in 33 CFR 1.06-30.

The following regulations issued pursuant to 46 U.S.C. Chapter 33 cover fields foreclosed from State regulation: 46 CFR parts 70, 71, 76, 78, 90-93, 95-98, 105, 107-108, 110-122, 125-134, 147, 147A, 148, 150-151, 153-154, 159-164, 166-169, 170-174, 175-185, 188-190, 193-196, and 199.

5. Regulations in effect on [EFFECTIVE DATE OF PUBLICATION OF FINAL RULE] and covering fields foreclosed from State regulation as described in 33 CFR 1.06-40.

The following regulations issued pursuant to 46 U.S.C. 3717 and 6101 cover fields foreclosed from State regulation: 33 CFR 151.15, 151.26(b)(3), 153.203, 155.1035(b), 164.61, part 173 subpart C; 46 CFR 4.05-1 through 4.05-10, 35.15-1, 197.484 through 197.488, 401.260.

6. Regulations in effect on [EFFECTIVE DATE OF FINAL RULE] and having the preemptive effect described in 33 CFR 1.06-50.

The following regulations issued pursuant to 33 U.S.C. 1901 through 1912 preempt similar, identical, or contrary State or local laws or regulations with the exception of State or local laws or regulations specifically permitted by Section 2003 of Public Law 100-220 or other similar express statutory authority: 33 CFR part 151, subpart A; 33 CFR 155.100 through 155.130, 155.350 through 155.400, 155.430, 155.440, 155.470, 155.1030(j) and (k), 155.1065(g), and all the regulations in 33 CFR part 157.

Dated: December 5, 2013.

F.J. Kenney,
Rear Admiral, U.S. Coast Guard, Judge
Advocate General.

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- Proposed Rule notes that this appendix “does not list all regulations that may have preemptive effect, or describe in totality the preemptive effect of all Federal statutes governing every Coast Guard activity.”

Issues with the Proposed Rule

- USCG failed to consult with States *before* issuing the proposed rule as required by E.O. 13132 (8/4/99) on federalism and the Presidential memorandum on preemption (5/20/09).
- List of regulations subject to USCG's preemption analysis is not exhaustive.
- Unclear whether the USCG intends even the general topic of regulation to be preemptive.
 - Could implicate state oil spill prevention regulations and potentially hinder a state's ability to protect its citizens from pollution by oil.

Next Steps

- Coast Guard should decide how to address the public's concerns.
- Comment period is closed; however, the Coast Guard may still review new comments although not required to do so.
- We will provide any updates to the proposed rule as they become available.